No. 11-_____

IN THE
Supreme Court of the United States

DELROY FISCHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 21, 2011

QUESTIONS PRESENTED FOR REVIEW

Petitioner was indicted for a violation of 18 U.S.C. section 922(g)(9), which makes it a crime to possess a firearm if previously convicted of a misdemeanor crime of domestic violence ("MCDV"). He moved to dismiss the indictment on the ground that his predicate misdemeanor conviction under Nebraska's third-degree assault statute was not a MCDV because it did not have, "as an element, the use or attempted use of physical force," as required by 18 U.S.C. section 921(a)(33)(A)(ii). Relying solely on factual findings in the state misdemeanor court record establishing Petitioner's use of physical force, the district court ruled, and the court of appeals affirmed, that the predicate misdemeanor statute "has, as an element, the use or attempted use of physical force."

The questions presented are:

1. Whether the use of force requirement of 18 U.S.C. section 921(a)(33)(A)(ii) is to be determined by the facts in the state misdemeanor court record or by the text of the misdemeanor statute?

2. Whether Nebraska's third-degree assault statute "has, as an element, the use or attempted use of physical force," for purposes of a criminal prosecution under 18 U.S.C. section 922(g)(9)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delroy Fischer ("Fischer") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

Fischer was indicted for violation of 18 U.S.C. section 922(g)(9). Record ("R.") 1. Prior to trial, he moved to dismiss the indictment on the ground that the predicate misdemeanor under which he was convicted — Nebraska Revised Statute ("Neb. Rev. Stat.") section 28-310(1) — was not a misdemeanor crime of domestic violence ("MCDV"), as defined in 18 U.S.C. section 921(a)(33)(A)(ii). R. 61, 62. On December 14, 2009, the district court denied Fischer's motion. The decision is reported at 2009 U.S. Dist. LEXIS 116302. Appendix ("App.") 13a-18a.

On June 23, 2010, the district court accepted Fischer's plea of guilty, Fischer having reserved his right to appeal the denial of his motion to dismiss. R. 93. On September 16, 2010, Fischer was sentenced to five months imprisonment, followed by five months of home confinement and three years of supervised release. R. 112.

On September 29, 2010, Fischer timely filed a notice of appeal. R. 115. On June 17, 2011, the court of appeals affirmed the district court's denial of Fischer's motion to dismiss. App. 1a-12a. The decision is reported at 641 F.3d 1006 (8th Cir. 2011).

On August 29, 2011, the court of appeals denied Fischer's petition for rehearing *en banc*, by a vote of seven to four. App. 19a.

JURISDICTION

The decision of the court of appeals was entered on June 17, 2011. On July 15, 2011, Fischer timely filed a Petition for Rehearing *En Banc*, which was denied on August 29, 2011. App. 19a. This court has jurisdiction under 28 U.S.C. section 1254(1), this petition having been filed timely under Rule 13 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. section 922(g)(9), which reads, in pertinent part: "It shall be unlawful for any person – who has been convicted in any court of a misdemeanor crime of domestic violence, to ... possess [a] firearm...." App. 21a.

It also involves 18 U.S.C. section 921(a)(33)(A) which, in pertinent part, provides that "the term 'misdemeanor crime of domestic violence' means an offense that — (i) is a misdemeanor under ... State ... law; and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person against a victim who is in a specified domestic relationship with the offender. App. 20a.

Finally, it involves the misdemeanor and attempt statutes upon which the section 922(g)(9) charge

against Fischer was based. Neb. Rev. Stat. section 28-310(1) reads in full: "A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) Threatens another in a menacing manner." App. 23a. The attempt statute, Neb. Rev. Stat. section 28-201(1)(a) and (2), is set forth in the Appendix. App. 21a-22a.

STATEMENT OF THE CASE

On February 24, 2009, this Court decided United States v. Hayes, 555 U.S. 415 (2009), resolving a split between the Fourth Circuit and nine other circuits, over the question whether the **domestic relationship** specified in the definition of a misdemeanor crime of domestic violence (18 U.S.C. § 921(a)(33)(A)(ii)) constituted a required element of the predicate misdemeanor. Hayes resolved the question in the negative, holding that the requisite domestic relationship was an element only of the federal offense defined in 18 U.S.C. section 922(g)(9), a fact to be proved beyond a reasonable doubt in a section 922(g)(9) prosecution. In this case, Petitioner is asking this Court to resolve a similar Circuit split, this time between the Eighth Circuit and six other circuits, over the question whether the **use of force element** of the predicate misdemeanor in a section 922(g)(9) prosecution is determined by factual findings found in the state court record, or by the text of the relevant misdemeanor statute.

In January 2006, Fischer was charged under Neb. Rev. Stat. section 28-323. Fischer, 641 F.3d at 1007.

Fischer pled guilty to an amended charge of attempted assault in the third degree under Neb. Rev. Stat. section 28-310(1). *Id.* On March 20, 2009, Fischer was charged under 18 U.S.C. section 922(g)(9) of unlawfully possessing a firearm after having been convicted of a MCDV. Fischer moved to dismiss the indictment on the ground that the predicate misdemeanor statute, Neb. Rev. Stat. section 28-310(1), does not have "as an **element**, the use or attempted use of physical force." Fischer, 2009 U.S. Dist. LEXIS 116302, at *1-*3 (emphasis added). The district court denied this motion. *Id.* at *6. The court of appeals affirmed, on the sole ground that the state trial court record contained uncontested **factual findings** that Petitioner had used physical force against his victim. Fischer, 641 F.3d 1006, 1009 (8th Cir. 2011) (emphasis added).

Denying Fischer's motion, the district court never examined the **language** of Neb. Rev. Stat. section 28-310(1) to determine if it "has" physical force as an element, as required by 18 U.S.C. section 921(a)(33)(A)(ii). *See* Fischer, 2009 U.S. Dist. LEXIS 116302, at *4-*6. Instead, the court looked at Fischer's underlying **conduct**, as it appeared in the record, and determined that he had, in fact, used physical force. *Id.* at *5.

In light of this ruling, Fischer pled guilty, while reserving his right to appeal the denial of his motion to dismiss based on the single issue whether Neb. Rev. Stat. section 28-310(1) meets the use of force requirement of 18 U.S.C. section 921(a)(33)(A)(ii). R. 93, 96. *See* Fischer, 641 F.3d at 1007, 1008.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's denial of Fischer's motion to dismiss. Relying solely on the recently decided case of United States v. Amerson, 599 F.3d 854 (8th Cir. 2010), the court concluded that, because Fischer "did not object to ... the **facts** establishing his use of physical force at his ... plea hearing" in the state misdemeanor proceeding, Fischer "'assented to **factual findings** that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii).'" Fischer, 641 F.3d at 1009 (emphasis added).

In a pointed concurring opinion, however, Judge Colloton questioned the Amerson decision:

> I see no material distinction between this case and ... *Amerson*, ... and I therefore agree that this panel must affirm Delroy Fischer's conviction based on circuit precedent. *Amerson* is probably **wrong,** however, and Fischer is likely **entitled to dismissal** of the indictment under the governing statutes.... [*Id.* at 1009 (Colloton, J., concurring) (emphasis added).]

Judge Colloton further explained:

> The difficulty with *Amerson* is the court's holding that "the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)" was satisfied by "factual findings" in the defendant's prior state court proceeding that the defendant used force against his girlfriend.... The **dispositive question** under § 921(a)(33)(A)(ii) is **not** whether the defendant *actually* ***used*** *force* in committing a

> misdemeanor offense, **but** whether the offense of conviction "*has as an **element*** the use or attempted use of physical force." [*Id.* at 1009-10 (italics original, emphasis added).]

Thus, Judge Colloton concluded:

> [T]he rule of § 921(a)(33)(A)(ii) is that a qualifying offense must have the use or attempted use of physical force "as an **element**," which by definition means that proof of that fact is required in **every case**. *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004). [*Id.* at 1010 (emphasis added).]

Based in part on Judge Colloton's concurring opinion, Fischer timely filed a Petition for Rehearing En Banc. A divided court of appeals denied Fischer's petition, with four of the eleven judges voting to grant the petition. App. 19a.

REASONS FOR GRANTING THE PETITION

I. THE FISCHER DECISION CONFLICTS WITH DECISIONS OF SIX OTHER UNITED STATES COURTS OF APPEALS.

A. The Courts Below Confused Factual Conduct with Legal Element.

As Circuit Judge Colloton's concurring opinion in Fischer demonstrates, both the district court and the court of appeals erroneously assumed that the legal

question was one of fact to be determined from the record of Fischer's state conviction. The district court made no reference whatsoever to the statutory language of the misdemeanor of which Fischer was convicted. Instead, the court took "notice of the arrest warrant affidavit as the **factual** basis of the plea," and found that "there [was] **evidence** that defendant struck the victim twice and bit her on the nose." Fischer, 2009 U.S. Dist. LEXIS 116302, at *4-*5. Then, in a *non sequitur*, the district court decided that, because "[t]he **factual** basis clearly included **acts** of violence ... this **offense** contained an **element** of physical force as required under 18 U.S.C. § 921(a)(33)(A)(ii)." *Id.* at *5-*6 (emphasis added). For this reason, the district court denied Fischer's motion to dismiss. *Id.* at *6.[1]

On appeal, the court of appeals affirmed. Like the district court, it relied upon the "arrest warrant and supporting affidavit" to establish that, as a matter of fact, Fischer had used physical force against the victim. Fischer, 641 F.3d at 1007-09. On that basis, the court of appeals drew two conclusions, one of which was correct and the other of which was not. First, the court correctly decided that Fischer had been charged with violating subsection 1(a) of the Nebraska statute by "caus[ing] bodily injury to another person." *See id.*, 641 F.3d at 1008-09. However, by relying solely on the

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[1] *See* Fischer, 641 F.3d at 1007 ("Relying on the arrest warrant and supporting affidavit which described Fischer's violent conduct, the district court concluded that Fischer's prior conviction did fit the definition [of an MCDV] and denied his motion to dismiss.")

same **"factual findings,"** the court then incorrectly resolved the wholly different **legal** question whether the language of Neb. Rev. Stat. section 28-310(1)(a) categorically "satisf[ies] the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *See* Fischer, 641 F.3d at 1009 (emphasis added).

B. The Fischer Opinion Conflicts with Decisions of the Courts of Appeals in the First, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits.

The court of appeals relied solely upon its 2010 decision in United States v. Amerson[2] in support of its decision:

> Like Fischer, the defendant in Amerson did not object to a state court's recitation of the **facts** establishing his use of physical force.... In doing so, he "assented" to factual findings that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii).... Because Amerson controls here, the district court did not err in concluding that Fischer's previous conviction qualified as a [MCDV]. [Fischer, 641 F. 3d at 1009 (emphasis added).]

However, as Judge Colloton observed in his concurring opinion in Fischer, "the rule of § 921(a)(33)(A)(ii) is that a qualifying offense must have the use or attempted use of **physical force** 'as an

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[2] 599 F.3d 854 (8th Cir. 2010).

element,' which by definition means that proof of that fact is **required** in **every case**."[3] In other words, as an element of the state offense, evidence of physical force would be **necessary** in every prosecution of Neb. Rev. Stat. section 28-310(1)(a), not merely **sufficient** in a particular prosecution, as the 8th Circuit panels ruled in both Fischer and Amerson.

In that way, both Fischer and Amerson directly conflict with the decisions of six other courts of appeals.

In prosecutions for violations of 18 U.S.C. section 922(g)(9) in United States v. Shelton, 325 F.3d 553 (5th Cir. 2003) and United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006), the state court records established that the defendants had used physical force against their victims. The Shelton Court ruled that this was irrelevant:

> Although ... Shelton [] admi[tted] in district court that he used physical force during the assault in question, we look to the **elements** set forth **in the statute — not** the actual **conduct** to determine whether the offense qualifies as a [MCDV]. [Shelton, 325 F.3d at 558 n.5 (emphasis added).[4]]

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[3] *Id.* at 1011 (Colloton, J., concurring) (emphasis added).

[4] The court found that the predicate misdemeanor statute (Texas Penal Code § 22.01(a)) included use of force as an element. *Id.*, 325 F.3d at 557-61. On the strength of a subsequent *en banc* Fifth Circuit opinion to the contrary, the Fifth Circuit decided that the

Likewise, the Griffith Court explained:

> The question is **not** whether the **actual conduct** that led to Griffith's prior conviction **involved physical force** or worse. If that were the question, this would be a simpler case because we know from the state court records that Griffith was convicted of ... hitting ... his wife [and] dragging her across the floor. Wife beating and dragging is conduct that involves physical force under any definition of that term. The § 921(a)(33)(A)(ii) definition, however, does **not** turn on the actual **conduct** underlying the conviction but on the **elements** of the state crime. [Griffith, 455 F.3d at 1341 (emphasis added).]

Fischer and Amerson also conflict with United States v. Nason, 269 F.3d 10 (1st Cir. 2001), United States v. White, 606 F.3d 144 (4th Cir. 2010), United States v. Belless, 338 F.3d 1063 (9th Cir. 2002), and United States v. Hays, 526 F.3d 674 (10th Cir. 2008). The appellate courts in each of these four cases addressed whether the underlying state offense "has, as an element the use or attempted use of physical force" by an examination of the **text** of the predicate misdemeanor statute, **not** the **facts** in the state court record.

Shelton interpretation of the Texas statute was erroneous and no longer binding, and ruled that the use of force was not an element of the Texas law. *See* United States v. Villegas-Hernandez, 468 F.3d 874, 880-82 (5th Cir. 2006).

In Nason, "Maine's general purpose-assault statute" was construed by the court "necessarily [to] involve the use of physical force," and thus, the convictions were affirmed. *Id.*, 269 F.3d at 20. In the other three cases — White, Belless, and Hays — the section 922(g)(9) federal charge was dismissed because the courts determined that the statute under which each defendant had been convicted did not necessarily require proof of the use or attempted use of physical force, as required by § 921(a)(33)(A)(ii).[5]

Unlike the Eighth Circuit panels in Fischer and Amerson, not one of these courts of appeals looked to the state court **facts** to ascertain whether the state **law** "has, as an element, the use or attempted use of force." The refusal to do so makes sense both as a matter of law and policy.

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[5] *See* White, 606 F.3d at 147 ("The issue to be decided in this case is whether the 'use ... of physical force,' as that term is used in § 921(a)(33)(A)(ii), is an **element** of the criminal offense of assault and battery under Virginia law." (Emphasis added.)); Belless, 338 F.3d at 1067 ("The Wyoming **statute** under which Belless was convicted defines the crime as 'unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another.' Belless argues (correctly, we conclude) that the Wyoming **statute** embraces conduct that does not include 'use or attempted use of physical force.'" (Emphasis added.)); and Hays, 526 F.3d at 679 ("[W]e conclude that the first prong of the Wyoming battery **statute** does not categorically satisfy the federal definition of [MCDV] found in § 921(a)(33)(A)(ii) because it [the statute] 'embraces conduct that does not include 'use or attempted use of physical force.'" (Emphasis added.)).

Logically, the elements of an offense ought to be the same in all cases regardless of the presence or absence of specific factual findings of the use of physical force in the record. Thus, for example, the rulings in White, Belless, and Hays would be the same in subsequent cases even if the records in those cases established that a particular defendant used or attempted to use physical force. Under Fischer and Amerson, however, the court's decision that Neb. Rev. Stat. section 28-310(1)(a) has, as an element, the use or attempted use of force would not be binding precedent in a future case in which the misdemeanor court record fails to establish physical force. As a matter of statutory interpretation, however, a statute either "has, as an element, the use or attempted use of physical force," or it does not have such an element.

Not only are Fischer and Amerson based upon faulty logic, but would be impossible to apply fairly and consistently. Like most misdemeanors, MDCV cases are primarily tried in courts not of record, where there is sparse indication of what actually transpired in any given case. Judges who try misdemeanor cases are not in the habit of parsing the elements of an offense. They almost never issue written opinions analyzing the statutory text, but are content to jot down brief notes capturing the essence of the offense and the testimony. State court records are simply not a reliable source upon which to draw out the requisite elements of any offense. Under the Fischer and Amerson rule, however, such records, whatever their degree of reliability and completeness, could be determinative.

Since Fischer and Amerson look to underlying facts, they provide no guidance in cases where there is an absence of underlying facts. In a case where there are no factual findings establishing force, presumably Fischer and Amerson govern, and the case would be dismissed. On the other hand, it is entirely possible that in such a circumstance the court would turn to the elements of the state crime to establish physical force. In that way, the government would be allowed to use a whichever theory results in conviction. Such a rule would be detached from any legal principle. A state misdemeanor statute is either a MCDV or it is not. Its status as such cannot possibly turn on the existence of factual findings in the state record that establish the use of force.

C. Neb. Rev. Stat. Section 28-310(1)(a) is Not a MCDV.

Preoccupied with a state court record establishing that, as a matter of fact, Fischer had used physical force, the Fischer Court characterized Fischer's legal argument as farfetched — that Neb. Rev. Stat. section 28-310(1)(a) is not an MCDV "because **a hypothetical** defendant could cause bodily injury to another person without using physical force." *Id.*, 641 F.3d at 1009 (emphasis added). But as circuit judge Colloton demonstrated with a string of case citations, Fischer's objection was real, supportable by numerous concrete scenarios, not just a single hypothetical:

> *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 880-81 (5th Cir. 2006) ("[I]t seems an individual could be convicted of intentional

> assault in the third degree for injury caused not by physical force, but by **guile**, **deception**, or even deliberate **omission**.")
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> *United States v. Perez-Vargas*, 414 F.3d 1282, 1286-87 (10th Cir. 2005) (citing examples of causing bodily injury by intentionally **placing** a **barrier** in front of a car causing an accident, or intentionally **exposing** someone to hazardous chemicals).
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> *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) ("[H]uman experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately **withholds vital medicine** from a sick patient.") [Fischer, 641F.3d at 1010, Colloton, J., concurring) (emphasis added).]

Indeed, in each of these three cases from three different circuits, the court had before it a third-degree assault statute substantially identical in language to Neb. Rev. Stat. section 28-310(1)(a). Each case presented the identical question, whether such statute "has, as element, the use of attempted use of physical force." *See* Villegas-Hernandez, 468 F.3d at 878-79; Perez-Vargas, 414 F.3d at 1285; and Chrzanoski, 327 F.3d at 192-93. In each case, the court decided that, since the statute in question could be violated without evidence of use or attempted use of physical force, it did not qualify as a statute that "has, as an element, the use or attempted use of physical force." *See*

Villegas-Hernandez, 468 F.3d at 879-85; Perez-Vargas, 414 F.3d at 1285-87; Chrzanoski, 327 F.3d at 193-97.

The United States District Court for the District of Hawaii reached the same result in a section 922(g)(9) prosecution based upon a predicate misdemeanor statute identical to Nebraska's, that defined a third degree assault as one in which a person "intentionally, knowingly, or recklessly caus[es] bodily injury to another person." United States v. Serrao, 301 F. Supp. 2d 1142 (D. Haw. 2004). That court reasoned:

> Nonforceful conduct can cause physical pain, illness, or impairment of physical condition. Oral threats, for example, could cause illness. Force is thus not a required element for an Assault in the Third Degree conviction. [*Id.* at 1145.]

Lastly, even the Nebraska Supreme Court has acknowledged that in Nebraska a "[t]hird degree assault may be committed in a variety of ways." Nebraska v. Pribil, 224 Neb. 28; 395 N.W.2d 543, 546 (1986). One of those ways is the "reckless" handling of a firearm, which accidentally causes the death of another, but without any proof that the defendant "used or attempted to use physical force" to cause the death. *See* Nebraska v. Bachkora, 229 Neb. 421; 427 N.W. 2d 71, 73 (1988).

D. The Decision of the Court Below Was Erroneous and Prejudicial.

While proof that Fischer used physical force was **sufficient** to meet the elements of the Nebraska misdemeanor, such proof of physical force would not be **necessary** in every case. Neither Fischer, nor Amerson on which Fischer exclusively relied, asked, much less decided, whether the predicate Nebraska misdemeanor statute requires proof of the use or attempted use of physical force. By its plain statutory language, there is no force requirement whatsoever in the Nebraska statute. As the Second Circuit ruled in Chrzanoski, "there is a 'difference between [i] causation of an injury and [ii] an injury's causation by the 'use of physical force.'" *Id.*, 327 F.3d at 194. Neb. Rev. Stat. section 28-310(1)(a) is plainly in the former, not the latter, category. The Fischer Court simply ignored this distinction by treating the question of statutory interpretation as if it were a matter of fact. The court concluded that, because Fischer had used physical force, Neb. Rev. Stat. section 28-310(1)(a) categorically qualifies as a MCDV statute. This mode of resolving whether the predicate misdemeanor statute "has, as an element, the use or attempted use of physical force" was plainly erroneous, prejudicial, and in conflict with the decisions of the First, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits.

II. THE FISCHER DECISION CONFLICTS WITH TWO DECISIONS WITHIN THE EIGHTH CIRCUIT, SOWING CONFUSION AMONG THE CIRCUITS.

In Fischer, Judge Colloton concurred in the result solely because he saw "no material distinction between this case and ... Amerson." Fischer, 641 F.3d at 1009 (Colloton, J., concurring). So bound, he "agree[d] that this panel must affirm Delroy Fischer's conviction based on circuit precedent." *Id.* However, Judge Colloton stated that "*Amerson* is probably wrong ... and **Fischer is likely entitled to dismissal** of the indictment...." *Id.* (emphasis added). In support, Judge Colloton cited two Eighth Circuit cases, United States v. Howell, 531 F.3d 621 (8th Cir. 2008) and United States v. Smith, 171 F.3d 617 (8th Cir. 1999). *Id.*, 641 F.3d at 1010-1011, both of which involved section 922(g)(9) prosecutions and questions concerning the elements of a MCDV.

A. Fischer Conflicts With United States v. Howell and United States v. Smith.

Relying on Howell, Judge Colloton correctly pointed out that a "federal court should use the judicial record of the defendant's prior conviction in state court **only** to determine *which offense* under state law was the offense of conviction." *Id.*, 641 F.3d at 1010 (italics original, emphasis added). The Missouri code at issue in Howell contained five distinct offenses, each with different elements. In order to determine which one of the five offenses the defendant had been convicted of, the Howell Court examined the state court record and

concluded that Howell had been charged with a violation of the fourth subsection that prohibited "recklessly engag[ing] in conduct which creates a grave risk of death or serious physical injury to another person...." Howell, 531 F.3d at 623. Having determined the subsection of conviction, the court turned away from the misdemeanor court record. Focusing on the language of the subsection, the court stated that "[t]he issue ... whether subsection (4) requires as an **element** either [i] 'the use or attempted use of physical force' or [ii] 'the threatened use of a deadly weapon' ... is a question of **law** for the court, **rather than** one of **fact** for the jury." *Id.* (emphasis added). After an examination of the language of the subsection, as interpreted and applied by the Missouri courts, the Howell Court concluded that subsection (4) contained neither such use as an element. *Id.* at 624.

In an effort to dissuade the Howell court, the Government contended that Howell's conviction should be affirmed because he had pled guilty to the charging document which asserted that he had "wav[ed] a loaded gun at her," thus satisfying the element of "threatened use of a deadly weapon." *Id.* Quoting Smith, the Howell Court rejected this argument, stating that "[t]he charging papers may be reviewed '**only** to determine under which portion of the assault statute (Howell) was convicted.'" Howell, 531 F.3d at 624 (emphasis added).

As Judge Colloton noted,[6] Howell followed the rule in Smith:

> When statutory language dictates that predicate offenses contain enumerated elements, we **must look only to the predicate offense** rather than to the defendant's underlying acts to determine whether the required elements are present." [*Id.*, 171 F.3d at 620 (emphasis added).]

Although Fischer and Amerson recited this rule, both broke it, holding that the factual findings of use of force in the state court records, not the language of the relevant Nebraska statutes, "satisfi[ed] the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *See* Amerson, 599 F.3d at 855; Fischer, 641 F.3d at 1009. Thus, Fischer and Amerson are in direct conflict with Smith and Howell.

B. Failure to Resolve the Conflict Within the Eighth Circuit Will Have Adverse Consequences.

Under the Eighth Circuit's "prior-panel precedent" rule,[7] Fischer and Amerson are binding within the Eight Circuit. In his petition for rehearing *en banc*,

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[6] *See* Fischer, 641 F.3d at 1010-11 (Colloton, J., concurring).

[7] "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." United States v. Betcher, 534 F.3d 820 (8th Cir. 2008) (citing Owsley v. Luebbers, 281 F.3d 687 (8th Cir. 2002)). *See* Fischer, 641 F.3d at 1009 (Colloton, J., concurring).

Fischer pointed out this internal conflict within the Eighth Circuit[8] and asked the court to rehear the case, but the petition was denied by a vote of seven to four.[9] Unless Fischer's petition for review is granted by this Court, the conflict within the Eighth Circuit will continue unresolved, with two serious adverse consequences for the federal appellate system.

First, even though an Eighth Circuit panel may be bound to follow Fischer and Amerson, not Smith and Howell, courts of appeals in the other circuits would not be so bound. For example, in United States v. Griffith, *supra*, the Eleventh Circuit relied upon Smith in support of its decision that "[t]he § 921(a)(33)(A)(ii) definition, ... does not turn on the actual conduct underlying the conviction but on the elements of the state crime...." *See* Griffith, 455 F.3d at 1341. Both Fischer and Amerson purported to rely on Smith, but as noted above, departed from the Smith rule. The failure in Fischer and Amerson to comply fully with Smith could very well cause confusion in the other circuits as to which decision embodies the Eighth Circuit rule.

Second, even within the Eighth Circuit, future prosecutions for violating section 922(g)(9) could very well trigger a variety of problematic issues. For example, a person may be charged with a violation of section 922(g)(9) based upon a conviction of a violation of Neb. Rev. Stat. section 28-310(1)(a). If the state trial

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[8] *See* Appellant's Petition for Rehearing En Banc (July 15, 2011).

[9] *See* Order. App. 19a.

record fails to establish the underlying facts, then Fischer presumably would not support a conviction. Would the Government's case rise or fall on the factual findings in the state record? Or would the Government be permitted to produce evidence of the use or attempted use of physical force in the commission of the predicate misdemeanor? Would this be a question of fact for the jury to resolve beyond a reasonable doubt or a question of law for the court? Or would the Government be permitted to argue that the force requirement of section 921(a)(33)(A)(ii) may be satisfied by implication of the language of Neb. Rev. Stat. section 28-310(1)(a)?

This petition should be granted to prevent such confusion that is sure to arise among the circuits from the conflicting decisions within the Eighth Circuit.

III. THE FISCHER DECISION CONFLICTS WITH CONTROLLING PRECEDENTS OF THIS COURT.

A. Fischer Conflicts with United States v. Hayes.

In United States v. Hayes, 555 U.S. 415 (2009), this Court decided that "the **domestic relationship**" required to prove a MCDV was **not** "a defining **element** of the predicate offense." *Id.*, 555 U.S. at 418 (emphasis added). Rather, the Court ruled that the domestic relationship was an element only of the federal offense, and thus, "it suffices for the Government to charge and prove a prior conviction that was, **in fact**, for 'an offense ... committed by' the

defendant against a spouse or other domestic victim." *Id.,* 555 U.S. at 421 (emphasis added).

In contrast, the Hayes Court stated that "the **use of force**" requirement was "undoubtedly a required **element**" of the predicate offense. *Id.* (emphasis added). As a "defining 'element,'" the Court continued, the use of force requirement is "'[a] **constituent** part of a claim that **must be proved for the claim to succeed.'"** *Id.*, 555 U.S. at 422 (emphasis added). Otherwise, the force requirement would not be an "element" of the predicate misdemeanor offense. *See* Fischer, 641 F.3d at 1011 (Colloton, J., concurring). *See also* Villegas-Hernandez, 468 F.3d at 879.

According to Fischer, however, it is sufficient for the Government in a section 922(g)(9) prosecution to show that the state court record contains "factual findings" establishing that the specific offense had been committed by the use or attempted use of force. *See* Fischer, 641 F.3d at 1009. This ruling flatly contradicts Hayes, treating the use of force as if it were not a defining element of the predicate misdemeanor. Yet, throughout the Hayes opinion the "use of force" requirement is distinguished from the domestic relationship element of a section 922(g)(9) prosecution. For example, in the majority opinion in Hayes, Justice Ginsburg noted that:

> Congress did revise the language of § 921(a)(33)(A)(ii) ... by replacing the unelaborated phrase "crime of violence," with the phrase "has, as an element, the use or attempted

> use of physical force, or the threatened use of a deadly weapon." [Hayes, 555 U.S. at 428.]

But, she concluded, in contrast to the use of force requirement, this insertion "does not evince an intention" to make the "domestic relationship between aggressor and victim ... a designated element of the predicate offense." *Id.*

By treating the use of force requirement the same as the domestic relationship requirement, the Fischer ruling flatly contradicts the distinction between the two expressed in Hayes. According to Hayes:

> Congress defined "misdemeanor crime of domestic violence" to include an offense "committed by" a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime. [*Id.,* 555 U.S. at 429.]

According to Fischer, however, a MCDV includes any offense committed by a person with the use or attempted use of physical violence, whether or not the misdemeanor statute itself designates the use of force as an element of the crime. Even if the use of force is a factual question, as Fischer and Amerson treated it, then, under Hayes, Fischer should have been given the right to have that issue proved to a jury beyond a reasonable doubt.

B. Fischer Conflicts with This Court's Categorical Approach to Predicate Criminal Offenses.

In Sykes v. United States, 564 U.S. 1, 131 S.Ct. 2267 (2011), this Court reaffirmed its long-standing rule that in determining whether a particular offense fits the definition of a predicate offense upon which a conviction or sentence shall be based, the Court follows the "categorical approach":

> [W]e look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction. That is, we consider whether the *elements of the offense* are of the type that would justify inclusion within the residual provision, without inquiring into the specific conduct of this particular offender....
> So while there may be little doubt that the circumstances of the flight in Sykes' own case were violent, the questions is whether § 35-44-3-3 of the Indiana Code, as a categorical matter, is a violent felony. [*Id.*, 131 S.Ct. at 2272 (italics original.]

Although this categorical approach may be "modified" to permit examination of the factual findings in order to identify the precise offense of which Fischer was convicted, once that offense is identified (*see* Johnson v. United States, 559 U.S. ___, 130 S.Ct. 1265, 1273 (2010)), the categorical approach requires the court to set aside the court record, and examine the precise offense itself, to ascertain its

elements. *See* Taylor v. United States, 495 U.S. 575, 600 (1990). Fischer failed to do this, concluding that Fischer's "assent[] to factual findings ... satisf[ies] the force requirement of 18 U.S.C. § 921(a)(33)(A)(9)(ii)," without any reference whatsoever to the statutory text of Neb. Rev. Stat. section 28-310(1)(a). Fischer, 641 F.3d at 1009.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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